IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

TUESDAY, THE 31ST JULY 2007 / 9TH SRAVANA 1929

WP(C).No. 18607 of 2007(M)

AGAINST THE ORDER IN IA 1965 2006 IN OS.649/1993 of PRL.M.C.KOZHIKODE-I

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PETITIONER:

E.ABDULKADER HAJI, S/O IBRAHIM HAJI,
NAGARAM AMSOM DESOM, KOZHIKODE TALUK.

BY ADV. SRI.M.P.SREEKRISHNAN
SMT.SHAHNA KARTHIKEYAN

RESPONDENTS:

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1. P.P.ABOOBACKER, S/O HAJI S.IMBICHIKOYA,
PONMANICHANTAKATH, NAGARAM AMSOM DESOM,
KOZHIKODE.

2. KOZHIKODE CORPORATION, REPRESENTED BY
ITS SECRETARY, CORPORATION OFFICE, CALICUT.

R2 BY ADV. SRI.P.V.KUNHIKRISHNAN,SC,KOZHIKODE CORP
R1 BY ADV SRI.K.A.SALIL NARAYANAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 31/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXTS:

EXT.P1: TRUE COPY OF JUDGMENT DT.22.7.2006 IN W.P(C) 21834/05Y OF THIS HON'BLE COURT

EXT.P2: -DO- OF AFFIDAVIT SUPPORTING APPLICATION DT. 24.5.06 IN I.A.NO:1965/06 IN O.S.649/03. PRL. MUNSIFF'S COURT, KOZHIKODE

EXT.P3: -DO- OF COUNTER AFFIDAVIT FILED BY THE PETITIONER DT.22.11.06

EXT.P4: -DO- OF PROOF AFFIDAVIT FILED BY POWER OF ATTORNEY HOLDER C.V.ABDUL GAFOOR

EXT.P5: -DO- OF ORDER IN I.A.1965 OF 2006 IN O.S.649/03

JJ /TRUE COPY/

P.A. TO JUDGE

M.N.KRISHNAN, J.

WP(C)No. 18607 OF 2007 M

Dated this the 31st July, 2007.

JUDGMENT

This writ petition is filed challenging the order of the court below in setting aside an ex parte decree after condonation of the delay. Learned counsel for the writ petitioner would contend that the party was not examined, only his power of attorney holder was examined and therefore there was no proper evidence before the court so as to set aside the ex parte decree. The court below had perused the evidence of the power of attorney holder and was convinced that the defendant has gone abroad on 11.4.2006. It is true that there are laches on the part of the defendants. But what is to be looked into is whether there is any gross negligence or grave misconduct. As early as in 1968 this Court has held that the sufficient cause for non-appearance has to be explained and that it has always to be remembered that broad principle of natural justice that informs our judicial institution is that a litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence. It was held that it was largely a matter of wise discretion to be exercised by the court bearing in

mind the wholesome principle that the right of a party to be heard should be negatived only if there is gross negligence or gross carelessness and that if some steps have been taken and application for restoration has been made with some diligence and some evidence adduced making out a sufficient cause for absence, restoration should be ordered, the minor misconduct or laches being created by the common curative of costs. This has been followed in the decision reported in **Plantation Corporation of Kerala Ltd. v. Hussain** {1998(1) KLT 1008} by a Division Bench of this Court. On an analysis of the materials it can be seen that the defendant was abroad. At least he has made earnest effort to file an application to set aside the ex parte decree. The power of attorney holder was at least examined. Cumulative effect of all these things would reveal that there has been no gross negligence or grave misconduct. Therefore, I am inclined to hold that an opportunity has to be given to the defendant to contest the case on merits. The court below has ordered payment of cost as well to the plaintiff. Therefore the hardship that is caused to the plaintiff is attempted to be compensated by way of a reasonable cost. Therefore, I do not find any

ground to interfere with the decision. Writ petition is dismissed.

M.N.KRISHNAN
Judge

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